



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 194 OF 2013**

**PELECIA OLUM.....CLAIMANT**

**VS**

**EXPORT PROCESSING ZONES AUTHORITY.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 8<sup>th</sup> February and filed in Court on 11<sup>th</sup> February 2013, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Memorandum of Reply on 4<sup>th</sup> June 2013 and an amended Reply and Counterclaim on 8<sup>th</sup> November 2013. The matter was heard on 13<sup>th</sup> February, 23<sup>rd</sup> June and 24<sup>th</sup> June 2014. The Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Pamela Namulanda Muchera and Water Cashier, Francisca Buttuk.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a cashier with effect from 15<sup>th</sup> July 2002. According to the contract of employment, the Claimant was to serve a probation period of six months upon which she would be confirmed to permanent and pensionable terms of employment. The Claimant duly completed her probation and was confirmed in January 2003. On 16<sup>th</sup> July 2012, the Claimant was deployed to the Water Cash Office.

3. On 31<sup>st</sup> July 2012, the Respondent's Board Audit Committee conducted investigations into various issues relating to financial impropriety during which staff working in the Finance Department, including the Claimant were questioned on revenue loss occasioned by certain individuals within the Department. The Claimant appeared before the Board Audit Committee on 31<sup>st</sup> July 2012 and on 17<sup>th</sup> August 2012, she received a letter of summary dismissal.

4. By her letter dated 21<sup>st</sup> August 2012, the Claimant requested for review of her summary dismissal and by letter dated 5<sup>th</sup> September 2012, the Respondent notified the Claimant that her case had been referred to the Inspectorate of State Corporations. Following a demand notice from the Claimant's Advocates, the Respondent wrote to the Claimant on 11<sup>th</sup> January 2013, asking her to appear before the Respondent's Disciplinary Committee. The Respondent forwarded the Claimant's certificate of service with this letter.

5. The Claimant's claim is as follows:

- a. A declaration that the termination of her employment was unfair and unlawful;
- b. Kshs. 50,300 being salary and allowances earned but not paid for the month of August 2012;
- c. Kshs. 36,216 being leave allowance at 6% of annual basic salary;
- d. Kshs. 50,300 being one month's salary in lieu of notice;
- e. Kshs. 603,600 being 12 months' salary in compensation for unfair termination;
- f. Costs and interest;
- g. Any other relief the Court may deem just to grant.

### **The Respondent's Reply and Counterclaim**

6. In its Memorandum of Reply as amended on 14<sup>th</sup> October 2013, the Respondent admits having employed the Claimant as a cashier effective 15<sup>th</sup> July 2002. On 16<sup>th</sup> July 2012 the Claimant was transferred to the Water Cash Office. According to the Respondent, the Claimant's transfer was informed by the fact that her integrity had been called to question as a result of lapses in the performance of her duties.

7. Following instructions by the Board, the Audit Committee conducted investigations into financial improprieties within the Finance Department. Pursuant to this, the Claimant appeared before the Audit Committee on 31<sup>st</sup> July 2012. The investigations found that the Claimant and another employee were involved in the loss of Kshs. 29,136, fifty percent of which the Respondent claims from the Claimant by way of a counterclaim. The Claimant was summarily dismissed on 17<sup>th</sup> August 2012 on grounds of gross misconduct and the Respondent states that prior to the dismissal, she was given an opportunity to be heard.

### **Findings and Determination**

8. The issues for determination in this case are as follows:

- a. Whether the Respondent had a valid reason for summarily dismissing the Claimant;
- b. Whether in effecting the dismissal the Respondent observed due procedure;
- c. Whether the Claimant is entitled to the reliefs sought;
- d. Whether the Respondent has made out a proper counterclaim against the Claimant.

### **The Termination**

9. Section 43 of the Employment Act, 2007 provides that:

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

10. The Claimant's employment was terminated by letter dated 17<sup>th</sup> August 2012 which reads as follows:

*“Following internal audit reports on financial impropriety at the Authority at the end of June 2012, the EPZA Board at its 164th Meeting held on 31st July 2012, tasked the Board Audit Committee to undertake on its behalf investigations on the various issues relating to financial impropriety at the Authority and report its findings to the Board.*

*Subsequently, following your appearance before the said Committee, it was found that you were involved in the revenue loss totaling to **Kshs. 1,203,488.00** as occasioned by Mr. Moses Nyongesa which amounts to gross misconduct. It was also found that you were involved in the loss of **Kshs. 29,136.00** which was money to have been banked by Mr. Peter Ndara in Finance Department.*

*The Board has therefore resolved that you be **summarily dismissed** from the service of the Authority w.e.f the date of this letter. Also, take note that 50% of **Kshs. 29,136.00** remains your liability to the Authority.*

*Yours faithfully,*

*BENJAMIN CHESANG*

**AG. CHIEF EXECUTIVE”**

11. According to this letter, the decision to summarily dismiss the Claimant was informed by two incidences of loss of money from the Respondent. First, there was the loss of Kshs. 1,203,488.00 occasioned by Moses Nyongesa. Then there was the loss of Kshs. 29,136 which was to have been banked by Peter Ndara. The Claimant denied any involvement in the double loss.

12. With regard to the Kshs. 1,203,488.00 loss, the Claimant testified that one of her duties as Head Office Cashier was to receive and confirm cash from the Water Cashier who at the time was Francisca Buttuk (Respondent's witness number 2). It was the Claimant's case that she had no authority to give instructions to Moses Nyongesa as far as collection of money from the water kiosks and transmission to the Water Cashier was concerned.

13. In the course of the trial, there were unverified allegations made by the Respondent's witnesses that the Claimant had given instructions that the money from the water kiosks be paid to her in the main Cash Office. However, none of the persons who were said to have made these reports to the Respondent's witnesses were called to testify and the Court therefore found this part of the Respondent's evidence to be of no probative value.

14. Further, the Respondent's defence took the line that because the Claimant failed to report that the revenue stream from the water kiosks had stopped flowing to the main Cash Office, then she was culpable for the loss. The Court was however unable to understand the rationale for the position taken by the Respondent in this regard; yet Francisca Buttuk who in her position as Water Cashier had the responsibility to receive cash emanating from the water kiosks, appears not to have been blamed in any way for her failure to report that she had not received any cash from the water kiosks from July 2011 to June 2012, a period of close to a year.

15. Indeed Buttuk herself told the Court that she only reported the matter to the Senior Accountant, Pauline Otieno when she was informed that Moses Nyongesa continued collecting cash from the water kiosks while he was on leave. The Court therefore found no plausible reason as to why the Respondent blamed the Claimant for the loss of Kshs. 1,203,488.00 while leaving Buttuk unscathed.

16. Moreover, according to the testimony of Pamela Namulanda Muchera, there were supervision lapses on the part of the Respondent's Finance Manager. When an employer fails in its supervisory and managerial roles, it cannot be allowed to sacrifice hapless employees operating in an inefficient and dishonest system.

17. In her defence against the second loss of Kshs. 29,136, the Claimant told the Court that she had given the money to Peter Ndara for banking. From the evidence on record, it would appear that it was not unusual for the Claimant to pass on cash to other staff for banking and the Respondent did not call Peter Ndara to controvert the Claimant's account on this loss. Even more critical, there was no evidence that the Claimant was afforded an opportunity to face Peter Ndara in a disciplinary hearing.

18. For the foregoing reasons, the Court finds that the Respondent failed to establish a valid reason for summarily dismissing the Claimant.

### **Termination Procedure**

19. The Claimant's letter of summary dismissal, accused her of gross misconduct.

Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

20. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

21. There is now firm jurisprudence in the Industrial Court on the standards to be observed in a disciplinary hearing within the meaning of Section 41. In a nutshell, an employee facing disciplinary action must be clearly notified of the reasons why disciplinary action is being considered. The employee must then be given an opportunity to face their accusers in a conducive environment that allows accompaniment by either a shop floor representative or a fellow employee. (see *Mwendwa Maluli Vs Kenya Power and Lighting Company Limited [2014] eKLR* and *Fredrick Saundi Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR*).

22. According to the evidence placed before the Court, the Claimant was summarily dismissed following an investigation conducted by the Respondent's Board Audit Committee which was precipitated by internal audit reports on financial impropriety. The Claimant testified and the Respondent's witnesses confirmed that employees within the Finance Department were asked to appear before the Audit Committee on very short notice. No charges were preferred against any of the employees required to appear before the Audit Committee and according to the Claimant, she expected to be asked about her duties and the attendant procedures.

23. The Respondent's first witness Pamela Namulanda Muchera who is the Human Resource Manager told the Court that in cases of gross misconduct the Respondent does not undertake any inquiries. Further to this, Counsel for the Respondent submitted that under Article 4.43 of the Export Processing Zones Authority Staff Rules and Regulations (Revised 2003) employees are not issued with charges in situations where termination of employment is in view. If indeed this is the correct interpretation of the Respondent's Staff Rules and Regulations, then the Regulations fly right in the face of the law and call for amendment.

24. It beats all logic that employees facing small ticket disciplinary actions such as warnings are served with the charges against them while those facing the ultimate disciplinary action of summary dismissal are denied this right. At any rate, how does one determine that an employee is guilty of gross misconduct without affording them the opportunity to be heard? From the foregoing, I find that in effecting the

Claimant's summary dismissal, the Respondent failed to observe due procedure and the dismissal was therefore unfair to that extent as well.

25. Before signing off this award, I find it worthwhile to comment on the Respondent's letter inviting the Claimant to appear before a Disciplinary Committee on 18<sup>th</sup> January 2013, five months after her dismissal on 17<sup>th</sup> August 2012. As held by this Court in *Farida Shaeen Vs Highlands Mineral Water Company Ltd [2014] eKLR*:

***“ Once an employee leaves the employment of an employer the environment within which a disciplinary inquiry can take place melts away.”***

26. I need to add that a disciplinary hearing is aimed at aiding an employer to make a just decision on an employee and must not be held as a formality just to satisfy the letter of the law. It follows therefore that in determining the lawfulness and fairness of a disciplinary process, the Court will inquire into the conduct of the employer and its management which is also taken into account in making the final award.

### **Reliefs**

27. In view of my finding that the termination of the Claimant's employment by way of summary dismissal was unfair for want of substantive justification and due process, I award her 12 months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct, including the unjustified withholding of the Claimant's final dues.

28. I further award the Claimant one month's salary in lieu of notice as well as salary for 17 days worked in August 2012. In light of my finding that the Claimant's summary dismissal was unlawful and unfair, the claim for leave allowance also succeeds and is allowed.

### **The Respondent's Counterclaim**

29. With regard to the Respondent's Counterclaim for 50% of the sum of Kshs. 29,136 the Court finds that no evidence was led on the Claimant's culpability in the loss and the counterclaim therefore fails and is dismissed.

### **Final Award**

30. In the final analysis I make an award in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation for unfair termination.....Kshs. 603,600
- b) One month's salary in lieu of notice.....Kshs. 50,300
- c) Salary for 17 days worked in August 2012.....Kshs. 28,503
- d) Leave allowance (23,300x12x6/100).....Kshs. 16,776

Total.....Kshs. 699,179

31. The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Order accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1<sup>ST</sup> DAY OF**

**DECEMBER 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ogalo-Omondi for the Claimant

Mr. Malebe for the Respondent